

1 DEAN S. KRISTY (CSB No. 157646)
dristy@fenwick.com
 2 JENNIFER C. BRETAN (CSB No. 233475)
jbretan@fenwick.com
 3 FIONA Y. TANG (CSB No. 298101)
ftang@fenwick.com
 4 SOFIA RITALA (CSB No. 342253)
sritala@fenwick.com
 5 FENWICK & WEST LLP
 555 California Street, 12th Floor
 6 San Francisco, CA 94104
 Telephone: 415.875.2300
 7 Facsimile: 415.281.1350

8 FELIX S. LEE (CSB No. 197084)
flee@fenwick.com
 9 FENWICK & WEST LLP
 801 California Street
 10 Mountain View, CA 94041
 Telephone: 650.988.8500
 11 Facsimile: 650.938.5200

12 Attorneys for Defendants Daniel J. Rosensweig,
 Andrew J. Brown, Nathan Schultz, John P.
 13 Fillmore, Robin Tomasello, Richard Sarnoff,
 Sarah Bond, Renee Budig, Paul LeBlanc, Marne
 14 Levine, Ted Schlein, Melanie Whelan, John York,
 and Nominal Defendant Chegg, Inc.

16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN JOSE DIVISION

19 IN RE CHEGG, INC. DERIVATIVE
 20 LITIGATION

Lead Case No.: 5:22-cv-00217-EJD

21 This Document Relates to:

22 ALL ACTIONS
 23
 24

**RESPONSE IN SUPPORT OF
 PLAINTIFFS' ADMINISTRATIVE
 MOTION TO CONSIDER WHETHER
 ANOTHER PARTY'S MATERIAL
 SHOULD BE SEALED**

1 Plaintiffs’ administrative motion to maintain the narrow redactions of sensitive and
2 confidential information under seal in their Amended Complaint (and keep the unredacted
3 version under seal) should be granted. Nominal defendant Chegg, Inc. (“Chegg” or the
4 “Company”) and defendants Daniel J. Rosensweig, Andrew J. Brown, Nathan Schultz, John P.
5 Fillmore, Robin Tomasello, Richard Sarnoff, Sarah Bond, Renee Budig, Paul LeBlanc, Marne
6 Levine, Ted Schlein, Melanie Whelan, John York (collectively with Chegg, “defendants”)
7 submit this response in support of that motion, which should be granted for at least three
8 reasons.

9 First, both governing law and the orders entered by the Court in this action prohibit
10 plaintiffs from using Chegg’s confidential information without filing it under seal. This
11 consolidated derivative action (allegedly brought on Chegg’s behalf) is premised on Chegg’s
12 alleged liability in a securities class action also pending before this Court, captioned *Leventhal v.*
13 *Chegg, Inc.*, Case No. 5:21-cv-09953-EJD (“*Leventhal*”). See March 29, 2022 stay order
14 (“March 2022 Order”) (noting the derivative allegations in the initial *Choi* derivative case were
15 based on “Chegg’s alleged liability in other pending matters, including: *Leventhal v. Chegg,*
16 *Inc.*” and staying the derivative litigation until after resolution of *Leventhal*); April 13, 2022 stay
17 order (“April 2022 Order”) (collectively the “Stay Orders”) (applying the same stay to this
18 consolidated derivative suit, which consolidated *Choi* with a substantially similar derivative
19 case). Under the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), plaintiffs in
20 *Leventhal* are prohibited from obtaining discovery unless and until that case survives a motion to
21 dismiss, which is currently pending and will be heard by the Court on June 29, 2023. As a
22 result, the parties agreed to provisions that ensured the PSLRA stay in *Leventhal* would not be
23 undermined by proceedings in this derivative case. March 2022 Order, ¶ 6 (“Because both *Choi*
24 and *Leventhal* are subject to a mandatory discovery stay ... plaintiff agrees not to share any such
25 Section 220 documents with plaintiffs in *Leventhal* or any other action.”); April 2022 Order, ¶
26 12 (applying the same terms to this consolidated derivative case). Specifically, the parties
27 agreed that, if Chegg supplied Board materials to the derivative plaintiffs (under the inspection
28 provisions of 8 *Del. C.* § 220), such materials would not be used in an amended complaint “until

1 the PSRLA stay is lifted in *Leventhal* or another substantially similar derivative case is filed.”
 2 March 2022 Order, ¶ 6; *see* April 2022 Order, ¶ 12.

3 Second, plaintiffs’ agreement to protect the confidentiality of these materials was a pre-
 4 condition to Chegg agreeing to a compromise to produce them. To eliminate burdens on the
 5 Court associated with the issue of whether this case should be stayed pending final resolution of
 6 *Leventhal*, the parties instead agreed to such a stay, with the proviso that Chegg would produce
 7 Section 220 documents as a compromise **only if** plaintiffs here agreed to treat the information as
 8 confidential.¹ Thus, under the stipulated agreement memorialized in the Court’s Stay Orders,
 9 the parties agreed that if plaintiffs filed an amended complaint, “[t]o the extent any such
 10 amended complaint is based on any information derived from the Section 220 documents,
 11 plaintiff agrees that references to such information will be filed under seal pursuant to applicable
 12 court rules”

13 To buttress those provisions in the Stay Orders, on November 22, 2022, plaintiffs and
 14 Chegg entered into a Confidentiality and Non-Disclosure Agreement (the “Confidentiality
 15 Agreement”), pursuant to which Chegg produced Section 220 documents to plaintiffs. Lee
 16 Decl., ¶ 8. The Confidentiality Agreement reiterated that the April 2022 Order “incorporated the
 17 terms of an earlier stipulation and proposed order to stay action entered on March 29, 2022.” *Id.*
 18 In light of the nature of the documents to be produced and the PSLRA stay, plaintiffs again
 19 _____

20 ¹ Plaintiffs were actually barred from even filing an amended complaint while the PSLRA stay
 21 remained in effect in *Leventhal*, and given that no “substantially similar” action had been filed at
 22 the time of the amended complaint. *See* March 2022 Order, ¶ 6, April 2022 Order, ¶ 12. Plaintiffs
 23 disregarded those provisions, embodied in this Court’s two Orders, which further underscores the
 24 propriety of sealing the narrow set of allegations here. *Id.*; *see* accompanying Declaration of
 25 Felix S. Lee (“Lee Decl.”), ¶ 12. Indeed, only after the amended complaint here was filed in
 26 contravention of the Orders, another derivative plaintiff filed suit in the Delaware Court of
 27 Chancery which sealed references to Section 220 documents. Defendants intend to seek a stay of
 28 that case as well.

1 “agree[d] not to share any Confidential Information with any plaintiff in the Leventhal Action
 2 ... or any other member of the putative class in the Leventhal Action,” and pledged that
 3 “[s]hould Plaintiffs or their counsel determine to file an amended or consolidated complaint in
 4 the Derivative Action based on any Company Information provided in the 220 Documents, the
 5 references to such information must be filed under seal pursuant to applicable court rules.” *Id.*
 6 Accordingly, sealing the narrow portions of the Amended Complaint would fulfill the intention
 7 of the parties, which were designed to protect Chegg’s interests, uphold the purposes of the
 8 PSLRA, and minimize burdens on the Court that would have otherwise ensued regarding the
 9 scope of the stay for this derivative suit.

10 Third, even in the absence of the foregoing, the information is confidential. As set forth
 11 in further detail below and in the supporting papers, it reflects non-public business, financial and
 12 competitive information of Chegg, as well as its processes and ways of analyzing its business,
 13 that should be treated as confidential and could adversely impact the interest of Chegg if
 14 publicly disclosed (including to competitors). *See* Lee Decl., ¶¶ 10-11.

15 THE MOTION TO SEAL SHOULD BE GRANTED

16 Under Local Rule 79-5(c)(1), an application to seal requires “a specific statement of the
 17 applicable legal standard and the reasons for keeping a document under seal, including an
 18 explanation of: (i) the legitimate private or public interests that warrant sealing; (ii) the injury that
 19 will result if sealing is denied; and (iii) why a less restrictive alternative to sealing is not
 20 sufficient[.]” Civil L.R. 79-5(c)(1).

21 The parties agree that the “compelling reason” standard applies to a motion to seal a
 22 complaint. *See* Mot. at 2-3 (citing *Doe v. Wolf*, 2020 WL 8743519, at *2 (N.D. Cal. July 24,
 23 2020); *Heath v. Google Inc.*, 2017 WL 3530593, at *2-3 (N.D. Cal. Aug. 14, 2017); *In re Google*
 24 *Inc. Gmail Litig.*, 2013 WL 5366963, at *2-3 (N.D. Cal. Sept. 25, 2013); *Delphix Corp. v. Actifio,*
 25 *Inc.*, 2014 WL 4145520, at *2 (N.D. Cal. Aug. 20, 2014)); *see also VLSI Tech. LLC v. Intel*
 26 *Corp.*, 2021 WL 6063965, at *1-2 (N.D. Cal. Dec. 22, 2021) (applying “compelling reasons”
 27 standard to seal portions of an exhibit to an answer that contain “sensitive financial and business
 28 information”); *Delfino Green & Green v. Workers Comp. Solutions, LLC*, 2015 WL 4235356, at

*1-2 (N.D. Cal. July 13, 2015) (applying “compelling reasons” standard to seal portions of a complaint that contain “confidential financial information”).

The parties also agree that protecting sensitive business information is a compelling reason to seal. *See* Mot. at 2 (citing *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016); *Droplets, Inc. v. Yahoo! Inc.*, 2019 WL 9443777, at *2 (N.D. Cal. June 18, 2019); *Jam Cellars, Inc. v. Wine Grp. LLC*, 2020 WL 5576346, at *2 (N.D. Cal. Sept. 17, 2020); *Asuragen, Inc. v. Accuragen, Inc.*, 2018 WL 4855435, at *2 (N.D. Cal. Jan. 30, 2018)); *see also Bunsow De Mory LLP v. North Forty Consulting LLC*, 2020 WL 7872198, at *1 (N.D. Cal. Oct. 22, 2020) (sealing portions of an answer that “reflect confidential business information and dealings between the parties that are not intended for public disclosure” and “references to licenses and the parties’ business models”); *Monterey Bay Military Housing, LLC v. Ambac Assurance Corp.*, 2019 WL 11658748, at *2 (N.D. Cal. July 11, 2019) (sealing portions of complaint that “relate to financial transactions that were intended to be, and have been, kept in confidence”).

This standard is met here. The Amended Complaint incorporates confidential Company materials. Not only are those documents protectable as a substantive matter in their own right, but if that information was not sealed, it would also serve to work an end run around the PSLRA discovery stay, which exists to protect Chegg, on whose behalf this derivative suit is purportedly brought to advance. Indeed, the narrow redactions sought here advance both private interests of the parties (enforcing their agreements and to act in Chegg’s best interests) and public interests (in abiding by Court Orders on which the parties relied in preventing unintended circumvention of the PSLRA).

First, the PSLRA stay requires that these materials remain under seal. As plaintiffs acknowledge, the PSLRA applies to *Leventhal*. March 2022 Order, ¶ 6. *See SG Cowen Sec. Corp. v. U.S. Dist. Court*, 189 F.3d 909, 912-13 (9th Cir. 1999) (PSLRA stay in effect until a court “has sustained the legal sufficiency of the complaint”). As indicated above, Chegg only agreed to provide Section 220 documents to these derivative plaintiffs in exchange for a consensual stay through final resolution of *Leventhal* (reducing motion practice before this Court

1 that would have otherwise ensued) on the express condition – memorialized in the Stay Orders
 2 and agreement of the parties – that any amended complaint referencing these materials would be
 3 filed under seal. Putting aside their inherently protectable nature, if the Section 220 materials are
 4 not kept under seal at this time, plaintiffs in *Leventhal* could try to use those materials in aid of
 5 their complaint while the motion to dismiss that case is pending, directly undermining the
 6 important public interests served by the PSRLA stay. *See SG Cowen*, 189 F.3d at 912 (“Congress
 7 clearly intended that complaints in these securities actions should stand or fall based on the actual
 8 knowledge of the plaintiffs rather than information produced by the defendants after the action
 9 has been filed.”); *In re Facebook, Inc. S’holder Derivative Privacy Litig.*, 411 F. Supp. 3d 649,
 10 653 (N.D. Cal. 2019) (“Congress’s attempt to address discovery abuse through the PSLRA
 11 ‘would be rendered meaningless’ if Plaintiffs could circumvent the stay simply by dressing up a
 12 securities action as a derivative one.”).

13 *Second*, as agreed and set forth in the Court’s two Stay Orders, plaintiffs were required to
 14 file information derived from Section 220 materials under seal. March 2022 Order, ¶ 6 (“To the
 15 extent any such amended complaint is based on any information derived from the Section 220
 16 documents, plaintiff agrees that references to such information will be filed under seal pursuant to
 17 applicable court rules.”); April 2022 Order, ¶ 12 (“The Consolidated Action shall be stayed on the
 18 same terms as those set forth in the Stay Order.”). Consistent with those Orders and the parties’
 19 agreement, on which Chegg relied, those materials should be maintained under seal.

20 *Third*, as plaintiffs acknowledge, the Section 220 materials referenced and quoted in the
 21 Amended Complaint contain sensitive commercial information that meets the “compelling
 22 reasons” test. As explained in the Lee Declaration, the Section 220 materials reflect Chegg’s
 23 non-public business, financial and competitive information, as well as processes and ways of
 24 analyzing its business, that was intended for Board deliberations, decision-making, and
 25 information. Such material is quintessentially sensitive commercial information meant for the
 26 Board that, if publicly disclosed to competitors (or others), would harm Chegg’s business. Lee
 27 Decl., ¶ 11. The risk to Chegg from disclosure in the context of this derivative case is particularly
 28 compelling “because a derivative suit is meant to further the best interests of *the company*.” *In re*

1 *Insys Therapeutics Inc. Derivative Litig.*, 2017 WL 5953515, at *3 (Del. Ch. Nov. 30, 2017)
 2 (emphasis in original) (citation omitted); *see also In re RH S'holder Derivative Litig.*, 2019 WL
 3 580668, at *4 (N.D. Cal. Jan. 23, 2019) (“In general, a derivative suit must be in the company’s
 4 best interest in order to proceed.”). Moreover, such risk is especially unwarranted given that
 5 plaintiffs have largely mis-portrayed the materials, taking statements out-of-context or cherry-
 6 picking others, which would create an unfair misimpression that could cause unfounded harm to
 7 Chegg. *See* Lee Decl., ¶ 11.

8 For the foregoing reasons, defendants respectfully request that this Court grant plaintiffs’
 9 administrative motion to seal.

10 FENWICK & WEST LLP

11 By: /s/ Dean S. Kristy
 12 Dean S. Kristy

13 Attorneys for Defendants Daniel J. Rosensweig,
 14 Andrew J. Brown, Nathan Schultz, John P. Fillmore,
 15 Robin Tomasello, Richard Sarnoff, Sarah Bond,
 16 Renee Budig, Paul LeBlanc, Marne Levine, Ted
 17 Schlein, Melanie Whelan, John York, and Nominal
 18 Defendant Chegg, Inc.

FENWICK & WEST LLP